In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 98-916V

(Filed: November 8, 2010)

NOT TO BE PUBLISHED[1]

THERESA CEDILLO and MICHAEL CEDILLO, as parents and natural guardians of Michelle Cedillo,	*	
Petitioners,	*	Vaccine Act Interim Fees and Costs; Fees for Omnibus Proceedings.
v.	*	
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	

DECISION AWARDING INTERIM FEES

HASTINGS, ***Special Master***.

In this case under the National Vaccine Injury Compensation Program (hereinafter "the Program"), the petitioners seek, pursuant to 42 U.S.C. § 300aa-15(e),[2] an interim award for attorneys' fees and costs incurred in the course of the petitioners' attempt to obtain Program

[1]This document will not be sent to electronic publishers as a formally "published" opinion. However, because this decision contains a reasoned explanation for my action in this case, I intend to post it on the United States Court of Federal Claims' website. Therefore, each party has fourteen days within which to object to the disclosure of any material in this decision that would constitute "medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." *See* 42 U.S.C. § 300aa-12(d)(4)(B)(2006); Vaccine Rule 18(b).

[2]The applicable statutory provisions defining the Program are found at 42 U.S.C. § 300aa-10 *et seq*. (2006). Hereinafter, for ease of citation, all references will be to 42 U.S.C. (2006).

compensation. After careful consideration, I have determined to grant the request in part at this time as it pertains to the Lommen Abdo law firm, for the reasons set forth below.

I

BACKGROUND

This case concerning Michelle Cedillo is one of more than 5,000 cases filed under the Program in which it has been alleged that a child's disorder known as "autism," or a similar disorder, was caused by one or more vaccinations. A detailed history of the controversy regarding vaccines and autism, along with a history of the development of the 5,000 cases in this court, was set forth in my Decision filed in this case on February 12, 2009, and will not be repeated here. However, a brief summary of one aspect of that history is relevant to this Decision.

A. The Omnibus Autism Proceeding

In anticipation of dealing with such a large group of cases involving a common factual issue--i.e., whether vaccinations can cause autism--the Office of Special Masters ("OSM") devised special procedures. On July 3, 2002, the Chief Special Master, acting on behalf of the OSM, issued a document entitled the Autism General Order # 1,[3] which set up a proceeding known as the "Omnibus Autism Proceeding" (OAP). In the OAP, a group of counsel selected from attorneys representing petitioners in the autism cases, known as the Petitioners' Steering Committee ("PSC"), was charged with obtaining and presenting evidence concerning the general issue of whether those vaccines can cause autism, and, if so, in what circumstances. The evidence obtained in that general inquiry was to be applied to the individual cases. Autism General Order # 1, 2002 WL 31696785, at *3, 2002 U.S. Claims LEXIS 365, at *8.

Ultimately, the PSC elected to present two different theories concerning the causation of autism. The first theory alleged that the *measles* portion of the MMR vaccine can cause autism, in situations in which it was alleged that thimerosal-containing vaccines previously weakened an infant's immune system. That theory was presented in three separate Program "test cases," including this *Cedillo* case, during several weeks of trial in 2007. The second theory alleged that the mercury contained in the thimerosal-containing vaccines can *directly affect* an infant's brain, thereby

[3]The Autism General Order # 1 is published at 2002 WL 31696785, 2002 U.S. Claims LEXIS 365 (Fed.Cl.Spec.Mstr. July 3, 2002). I also note that the documents filed in the Omnibus Autism Proceeding are contained in a special file kept by the Clerk of this court, known as the "Autism Master File." An electronic version of that File is maintained on this court's website. This electronic version contains a "docket sheet" listing all of the items in the File, and also contains the complete text of most of the items in the File, with the exception of a few documents that are withheld from the website due to copyright considerations or due to § 300aa-12(d)(4)(A). To access this electronic version of the Autism Master File, visit this court's website at www.uscfc.uscourts.gov. Select the "Vaccine Info" page, then the "Autism Proceeding" page.

substantially contributing to the development of autism. The second theory was presented in three additional "test cases" during several weeks of trial in 2008.

On February 12, 2009, decisions were issued concerning the three "test cases" pertaining to the PSC's *first* theory. In each of those three decisions, the petitioners' causation theories were rejected. I issued the decision in this case, *Cedillo v. Secretary of HHS*, No. 98-916V, 2009 WL 331968 (Fed. Cl. Spec. Mstr. Feb. 12, 2009). Special Master Patricia Campbell-Smith issued the decision in *Hazlehurst v. Secretary of HHS,* No. 03-654V, 2009 WL 332306 (Fed. Cl. Spec. Mstr. Feb. 12, 2009). Special Master Denise Vowell issued the decision in *Snyder v. Secretary of HHS*, No. 01-162V, 2009 WL 332044 (Fed. Cl. Spec. Mstr. Feb. 12, 2009).

Those three decisions were later each affirmed in three different rulings, by three different judges of the U.S. Court of Federal Claims. *Hazlehurst v. Secretary of HHS*, 88 Fed. Cl. 473 (2009); *Snyder v. Secretary of HHS*, 88 Fed. Cl. 706 (2009); *Cedillo v. Secretary of HHS*, 89 Fed. Cl. 158 (2009). Two of those three rulings were then appealed to the U.S. Court of Appeals for the Federal Circuit, again resulting in affirmances of the decisions denying the petitioners' claims. *Hazlehurst v. Secretary of HHS*, 604 F. 3d 1343 (Fed. Cir. 2010); *Cedillo v. Secretary of HHS*, 617 F. 3d 1328 (Fed. Cir. 2010).

On March 12, 2010, the same three special masters issued decisions concerning three separate "test cases" pertaining to the petitioners PSC's *second* causation theory. Again, the petitioners' causation theories were rejected in all three cases. *King v. Secretary of HHS*, No. 03-584V, 2010 WL 892296 (Fed.Cl.Spec.Mstr. Mar. 12, 2010); *Mead v. Secretary of HHS*, No. 03-215V, 2010 WL 892248 (Fed.Cl.Spec.Mstr. Mar. 12, 2010); *Dwyer v. Secretary of HHS*, No. 03-1202V, 2010 WL 892250 (Fed.Cl.Spec.Mstr. Mar.12, 2010). None of the petitioners elected to seek review any of those three decisions.

B. The request for "interim" fees and costs in this case

On August 19, 2008, the petitioners in this case filed their application for interim fees and costs. In their application, the petitioners sought a total of $2,180,885.29 for interim fees and costs. Respondent filed a lengthy response on November 12, 2008, and the petitioners filed a lengthy reply on January 26, 2009. This very large request reflected the fact that this case was, as explained above, one of the "test cases" in the OAP. Because this was a 'test case" in which the petitioners sought to present *all* of the "general causation" evidence concerning the theory that "MMR" vaccines can cause autism, several different law firms participated in the development and presentation of the evidence, while multiple expert witnesses prepared expert reports and testified at length for petitioners during the evidentiary hearing. The high total sought by petitioners reflects the participation of all those law firms and expert witnesses.

In response to this massive request for fees and costs encompassing many months of work by multiple attorneys and expert witnesses, the respective parties engaged in lengthy discussions. As to several of the law firms involved, after such discussions the law firm in question reduced its

claim, and the respondent withdrew its objection to that firm's claim. The parties also agreed that it made sense, in these unusual circumstances, that the overall request be separated into parts, according to the various law firms involved, with several different "interim fees" awards being made if necessary.

Accordingly, I have filed a *series* of interim fees decisions in this case, each decision resolving a part of the overall claim. On November 18, 2008, I issued an interim costs award in this case reflecting the Cedillo family's out-of-pocket expenses. On March 11, 2009, I issued an interim award for fees and costs attributable to some of petitioners' attorneys: Conway, Homer & Chin-Caplan; Yen Pilch Komadina & Flemming, PC; and Williams Love O'Leary & Powers, PC. On May 21, 2009, I issued an interim award for fees and costs attributable to the Maglio Christopher & Toale law firm. On March 16, 2010, I issued an award for fees and costs attributable to the Williams Kherkher law firm. The present decision will address only the fees and costs of the Lommen Abdo law firm that pertain to that firm's participation in the *Cedillo* case.[4]

II

LEGAL STANDARD

Special masters have the authority to award "reasonable" attorney's fees in Vaccine Act cases. § 300aa-15(e)(1). This is true even when a petitioner is unsuccessful on the merits of the case, if the petition was filed in good faith and with a reasonable basis. (*Id*.) "The determination of the amount of reasonable attorneys' fees is within the special master's discretion." *Saxton v. Secretary of HHS*, 3 F.3d 1517, 1520 (Fed. Cir. 1993); see also *Shaw v. Secretary of HHS*, 609 F.3d 1372, 1377 (Fed. Cir. 2010). This court has employed the "lodestar" method to determine reasonable attorneys' fees. *Avera v. Secretary of HHS*, 515 F.3d 1343, 1347 (Fed. Cir. 2008); *Saxton v. Secretary of HHS*, 3 F.3d 1517, 1521 (Fed. Cir. 1993); *Rupert v. Secretary of HHS*, 52 Fed. Cl. 684, 686 (2002). The lodestar method, indeed, has been prescribed by the Supreme Court as the preferred method for the calculation of all attorneys' fees awarded by statute. *City of Riverside v. Rivera*, 477 U.S. 561-62 (1986); *Hensley v. Eckerhart*, 461 U.S. 424, 429-37 (1983).[5]

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[4]I note that there has been considerable delay between the status conference of March 16, 2010, when I was notified by the parties that they would not be able to settle the Lommen Abdo portion of the interim fees and costs request, and the issuance of this Decision. Under ordinary conditions, I would have been able to issue this Decision much more promptly after being so notified, and I regret that I was not able to complete this Decision sooner. However, during the time period in question, I had just finished the enormous task of preparing the decision in the autism "test case" which was filed as *King v. Secretary of HHS*, No. 03-584V, 2010 WL 892296 (Fed. Cl. Spec. Mastr. March 12, 2010). During the many months that it took me to complete that *King* decision, a number of other matters "stacked up" for resolution, and I needed to finish those matters before turning my attention to this Decision in recent weeks.

[5]The Supreme Court has declared that "[t]he standards set forth in [the *Hensley*] opinion are (continued...)

Under the lodestar approach, the basic calculation starts with the number of hours reasonably expended by the attorney, and then multiplies that figure by a reasonable hourly rate.[6] The reasonable hourly rate is "the prevailing market rate" in the relevant community for similar services, by lawyers of "comparable skill, experience, and reputation." *Blum v. Stenson*, 465 U.S. 886, 896 n.11 (1984). The burden is on the fee applicant to demonstrate that the rate claimed is appropriate. *Id*. As the Supreme Court recognized in *Blum*, the determination of an appropriate market rate is "inherently difficult." *Id*. In light of this difficulty, the Court gave broad discretion to the trial judge to determine the prevailing market rate in the relevant community, given the individual circumstances of the case. *Id*.

Further, as to all aspects of a claim for attorneys' fees and costs, the burden is on the *petitioner* to demonstrate that the attorneys' fees claimed are "reasonable." *Sabella v. Secretary of HHS*, 86 Fed. Cl. 201, at 215 (Fed. Cl. 2009); *Hensley*, 461 U.S. at 437; *Rupert*, 52 Fed.Cl. at 686; *Wilcox v. Secretary of HHS*, No. 90-991V, 1997 WL 101572, at *4 (Fed. Cl. Spec. Mstr., Feb. 14, 2007). The petitioners' burden of proof to demonstrate "reasonableness" applies equally to *costs* as well as attorneys' fees. *Perreira v. Secretary of HHS*, 27 Fed. Cl. 29, 34 (1992), *aff'd* 23 F.3d 1375 (Fed. Cir. 1994). The petitioner is not given a "blank check to incur expenses." *Id*.

One test of the "reasonableness" of a fee or cost item is whether a hypothetical petitioner, who had to himself pay his attorney for Vaccine Act representation, would be willing to pay for such expenditure. *Riggins v. Secretary of HHS*, No. 99-382V, 2009 WL 3319818, at *3 (Fed. Cl. Spec. Mstr. June 15, 2009), *aff'd by unpublished order* (Fed. Cl. Dec. 10, 2009); *Sabella v. Secretary of HHS*, No. 02-1627V, 2008 WL 4426040, at *28 (Fed. Cl. Spec. Mstr. Aug. 29, 2008), *aff'd in part and rev'd in part*, 86 Fed. Cl. 201 (2009). In this regard, the United States Court of Appeals for the Federal Circuit has noted that--

> [i]n the private sector, 'billing judgment' is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's **client** also are not properly billed to one's **adversary** pursuant to statutory authority.

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[5](...continued)
generally applicable in all cases in which Congress has authorized an award of fees." *Hensley*, 461 U.S. at 433 n.7. In *Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989), that Court reaffirmed its view that such approach is "the centerpiece of attorney's fee awards."

[6]Once a total, sometimes called the "lodestar," is reached by multiplying the reasonable hourly rate by the number of hours expended, it may then be appropriate in a few cases to adjust the lodestar upward or downward based on the application of special factors in the case. *Hensley*, 461 U.S. at 434; *see also Martin v. United States*, 12 Cl. Ct. 223, 227 (1987), *remanded on other grounds*, 852 F.2d 1292 (Fed. Cir. 1988). However, such adjustments are to be made only in the exceptional case, on the basis of a specific and strong showing by the fee applicant. *See, e.g., Blum v. Stenson*, 465 U.S. 886, 898-902 (1984); *Hensley*, 461 U.S. at 434 n.9; *Copeland v. Marshall*, 641 F. 2d 880, 890-94 (D.C. Cir. 1980) (*en banc*). Here, the petitioners have not requested any such adjustment of the "lodestar" figure.

Saxton v. Sec'y of Health & Human Services, 3 F.3d 1517, 1521 (Fed. Cir. 1993) (emphasis in original), quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433-34. Therefore, in assessing the number of hours reasonably expended by an attorney, the court must exclude those "hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission." *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983); see also *Riggins*, 2009 WL 3319818, at *4.

Additionally, while a special master may choose to utilize a "line-by-line" analysis to analyze a fees and costs application, the special master is not *required* to do so. Depending on the circumstances of the case, the special master may find it appropriate to make a *percentage reduction* of hours, to use his or her experience to *estimate* a reasonable number of hours that it should have taken to accomplish a particular task, or to use some other method to determine a reasonable amount for a fees or costs item. *Saxton*, 3 F. 2d at 1521 (50% reduction of attorney hours approved by Federal Circuit); *Wasson v. Secretary of HHS*, 24 Cl. Ct. 482 at 484-86 (Ct. Cl. 1991), *aff'd*. 988 F. 2d 131 (Fed. Cir. 1993); *Riggins*, 2009 WL 3319818 at *4; *Jeffries v. Secretary of HHS*, No. 99-670, 2006 WL 39303710, at *8 (Fed. Cl. Spec. Mstr. Dec. 15, 2006); *Ray v. Secretary of HHS*, No. 04-184V, 2006 WL 1006587, at *10 (Fed. Cl. Spec. Mstr. Mar. 30, 2006); *Broekelschen v. Secretary of HHS*, No. 07-137, 2008 WL 5456319, at *6 (Fed. Cl. Spec. Mstr. Dec. 17, 2008); *Castillo v. Secretary of HHS*, No. 95-652V, 1999 WL 1427754, at *3 (Fed. Cl. Spec. Mstr. Dec. 17, 1999).

III

APPROPRIATENESS OF AN AWARD FOR INTERIM FEES AND COSTS

A detailed discussion of the appropriateness of awarding interim fees and costs in this case, and of the appropriateness of multiple interim fees and costs awards in this case, is set forth in my Decision filed on March 11, 2009, and will not be repeated here. As noted in that decision, respondent's counsel has represented that due to the unique nature of this *Cedillo* case as a "test case" in the Omnibus Autism Proceeding, respondent does not object to the issuance of a series of interim awards to the several law firms that participated in the presentation of evidence in this specific case.

During an unrecorded telephonic status conference on March 16, 2010, counsel for both parties reported that concerning certain fees and costs issues in this case, that were not resolved in my prior decisions mentioned above, a decision by the special master would be required, since the parties could not reach agreement. This Decision will address only the fees and costs claim of the Lommen Abdo law firm.

IV

LIST OF RELEVANT DOCUMENTS FROM THIS *CEDILLO* RECORD

The record of this Cedillo case, of course, is vast. The documents most relevant to the determination of an appropriate "interim fees" award for the Lommen Abdo firm, however, are few. Those documents, upon which I have chiefly based my ruling, are as follows:

- "Petitioner's Application for Interim Fees and Costs," filed on August 19, 2008, Tab K (at pp. 512-517), Lommen Abdo attorneys' fees (including the original billing record), and Tab L (at pp. 518-519), Lommen Abdo attorneys' costs.

- "Respondent's Response to Petitioners' Request for Interim Attorneys' Fees and Costs," filed on November 12, 2008, pp. 50-52.

- "Petitioners' Reply to Respondent's Response to Petitioners' Application for Interim Fees and Costs," filed on January 26, 2009, including "Summary of Opposition to Fees and Costs of Lommen Abdo," p. 7; "Specific Response of Lommen Abdo," pp. 60-61; and Tab C – "Lommen Abdo Response to Respondent's Opposition to Fee/Cost Application," pp. 1-3.

- Exhibit 139 – "Affidavit of Sheila A. Bjorklund of Lommen Abdo Law Firm," filed June 2, 2009, with an updated billing record at pages 5-7.

- Transcript of telephonic conference held on October 6, 2010.

V

HOURLY RATE

There have been two filings in the *Cedillo* case that describe the fees requested on behalf of the Lommen Abdo firm. The initial description is contained in Petitioner's Application for Interim Fees and Costs ("Petitioners' Application"), which was filed on August 19, 2008. In this document, petitioners request payment for the services of attorney Sheila Bjorklund, performed during 2007, at a rate of $385 per hour.

Respondent objected to that requested hourly rate in Respondent's Response to Petitioners' Request for Interim Attorneys' Fees and Costs, which was filed on November 12, 2008, arguing that the requested rate included an inappropriate "contingency fee." ("Respondent's Response," p. 51.) Respondent supported this objection by reference to a fees decision in another Vaccine Act case, *Paul v. Secretary of HHS*, No. 05-886V, 2007 WL 4577394 (Fed. Cl. Spec. Mstr. Dec. 13, 2007).

Petitioners filed a Reply to Respondent's Response in the *Cedillo* case, on January 26, 2009. ("Petitioners' Reply".) This filing offered the explanation that the "Lommen Abdo billing statement for Ms. Bjorklund's work on the Cedillo matter was submitted * * * in September 2007, three months prior to the filing and determination of fees/costs in the *Paul*" case. (Petitioners' Reply, Tab C, p. 2.) After the ruling in *Paul*, the Lommen Abdo firm adjusted its billing rates with regard to Ms. Bjorklund to conform with the rates determined in *Paul*. After *Paul*, the firm "consistently billed her hourly rate for Vaccine Program matters at * * * $275/hour in 2007." (*Id.*)

Further, on May 22, 2009, I issued an Order in this *Cedillo* case directing each law firm that had unresolved claims for fees to file an affidavit or declaration under penalty of perjury, attesting to each attorney's standard rates of pay during the preceding three years in Vaccine Program cases and in non-Vaccine Program cases. On June 2, 2009, the Lommen Abdo firm filed the affidavit of Sheila Bjorklund ("Bjorklund Affidavit"). This document asserts that Ms. Bjorklund billed at an hourly rate of $275 per hour during 2007 in both types of cases. (Bjorklund Affidavit, at 3.) Furthermore, the Bjorklund Affidavit contains a detailed description of Ms. Bjorklund's education and legal experience that would justify such a rate of payment. Based on this evidence, I conclude that $275 per hour is a reasonable rate of payment for work performed in 2007 by Ms. Bjorklund.

VI

REASONABLENESS OF NUMBER OF HOURS BILLED

A. Hours claimed

Petitioners' Application described 124.9 hours of work performed by Ms. Bjorklund on the *Cedillo* matter, between May 21 and June 20, 2007. (Petitioners' Application, Tab K, pp. 1-2.) On June 2, 2009, petitioners filed the Bjorklund Affidavit. Attached to that affidavit, Ms. Bjorklund listed 22 additional hours in which she worked on the *Cedillo* trial on June 21-26.

B. The parties' arguments

Respondent's Response presented a specific objection to 55.9 of those hours, which according to respondent involved preparation by Ms. Bjorklund for cross-examination of respondent's expert witness Dr. Brent. (Respondent's Response, p. 51.) Respondent also specifically objected to payment for 36 hours that Ms. Bjorklund spent attending the first week of the *Cedillo* hearing, and five hours of travel time to-and-from Washington D.C.

Petitioners replied to these objections in their reply brief on January 26, 2009. The Conway, Homer, Chin-Caplan ("CHC") law firm, which provided the lead counsel in the *Cedillo* trial, explained that the CHC attorneys requested Ms. Bjorklund's help particularly in evaluating the evidence submitted by Dr. Brent, one of respondent's most important witnesses, and in preparing the CHC attorneys for cross-examination of Dr. Brent. (Petitioners' Reply, pp. 60-61.) Further, the Lommen Abdo firm submitted an additional response. (Petitioners' Reply, Tab C.) That response

explains that Ms. Bjorklund's role included analysis of the evidence submitted by three of respondent's experts. (*Id*. at p. 1.) It further states that during the *Cedillo* evidentiary hearing itself, Ms. Bjorklund "provided ongoing support to the 'on-stage' trial team, including research as necessitated by the day's events, witness preparation, and assistance with the countless other details that arise in trying a case." (*Id*.)

C. Telephonic status conference

In addition, to clarify matters about which I was unclear based upon the written documents, I conducted a recorded telephonic conference on October 6, 2010, to discuss this matter. At the conference, I asked Ms. Bjorklund to further describe her role in the preparation for the *Cedillo* trial and during the trial itself. She described her role.

D. Discussion

1. Most of the claimed hours appear reasonable

After consideration of the arguments of both parties, as described above, I find it reasonable to compensate Ms. Bjorklund for most, though not all, of the hours claimed. The petitioners' Reply (pp. 60-61 and Tab C), along with her explanation during the conference held on October 6, 2010, persuade me that Ms. Bjorklund likely provided valuable services to the lawyers who actually tried the *Cedillo* case for petitioners. Clearly, that small petitioners' trial team needed some assistance in analyzing the massive amount of evidence presented by the respondent. Ms. Bjorklund provided such assistance, during the weeks immediately prior to the trial and during the three-week trial itself. The amount of time claimed by Ms. Bjorklund for the purpose of providing such assistance generally seems reasonable.

2. Pre-trial period

Specifically, it seems quite reasonable for Ms. Bjorklund to have spent a considerable amount of time during the pre-trial period analyzing the evidence presented by three of respondent's experts, and assisting the petitioners' trial team in preparing cross-examination of such experts. One of those experts was Dr. Brent, who filed a lengthy expert report and submitted 60 medical articles to accompany them. (Petitioners' Reply, pp. 60-61.) It is clear from the billing records submitted in the application (Petitioners' Application, Tab K) that much of the time that Ms. Bjorklund spent on the *Cedillo* case was spent on Dr. Brent's evidence. And it also appears to me that because of the large amount of material that Dr. Brent submitted, plus the extreme importance of his testimony in the context of the overall case, it was reasonable for Ms. Bjorklund to have spent *many* hours scrutinizing his evidence, in order to assist the petitioners' trial attorneys. For example, it would not be surprising if a litigator expended an hour or more to comprehend each of the sixty articles that Dr. Brent used to support his primary arguments.

Accordingly, I will compensate Ms. Bjorklund for all of hours claimed for the pre-trial period, from May 21 through June 10, 2007.

In sum, I conclude that Ms. Bjorklund played an important role in providing assistance to petitioners' trial team, in analyzing the evidence provided by Dr. Brent and other of respondent's expert witnesses. It is crucial that the CHC firm itself confirmed this role of Ms. Bjorklund. (Petitioners' Reply, pp. 60-61.) And when I study the billing records provided for Ms. Bjorklund's work (Petitioners' Application, Tab K) for the days from May 21, 2007, through June 10, 2007, the immediate pre-trial period, I conclude that the hours billed for those time periods are reasonable for the assistance that Ms. Bjorklund provided.[7]

3. Trial period

Analysis of the reasonableness of Ms. Bjorklund's hours billed for the period of trial (June 11 through June 26, 2007) is a closer question. I am keenly aware, of course, that other attorneys did the primary work on the petitioners' behalf during the *Cedillo* trial. Attorney Sylvia Chin-Caplan acted as "lead counsel," handling the largest share of the actual examination and cross-examination of witnesses. Attorney Thomas Powers also participated substantially in witness examination. Attorney Kevin Conway, a law partner of Ms. Chin-Caplan, clearly worked closely with her throughout the trial as well. And attorney Clifford Shoemaker was also present at petitioners' counsel table throughout the trial, conferring with the three other trial attorneys throughout the trial period. In my interim fees award made in this case on March 11, 2009, I awarded considerable compensation for the trial work of attorneys Chin-Caplan, Conway, and Powers. I will also soon be awarding fees for the services of Mr. Shoemaker during the *Cedillo* trial. I realize, of course, that it is highly unusual for five different attorneys for one side to bill substantial hours for trial work in a single trial.

However, this is a highly unusual case, in two different and important respects. First, in my Decision concerning the merits of this case, filed on February 12, 2009, I described at length the *massive amount* of the evidence in this *Cedillo* case, as well as the *extreme complexity* of the scientific issues. (See pp. 18-19.) Clearly, there was enough material to be mastered in this case to productively use the time of multiple attorneys, by both sides.

The second factor is the *extreme importance* of this case. This *Cedillo* case was the initial "test case" in the Omnibus Autism Proceeding, in which the petitioners were advancing the general theory that the MMR (measles-mumps-rubella) vaccine and/or thimerosal-containing vaccines can contribute to the causation of autism. The outcome of the case would influence the fates of the cases of approximately 5,000 different autistic children, who all filed petitions alleging that their autistic conditions were vaccine-caused.

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[7]The one exception is for travel time billed for June 10, 2007. See my separate discussion at p. 11 below.

In these extremely unusual circumstances, unique in the history of the Vaccine Act, I find that it was reasonable that Ms. Bjorklund acted, in effect, as an additional attorney member of the petitioners' trial team during the trial. The extreme complexity and importance of the case warranted her participation as well as that of the other attorneys. During the first week of trial, Ms. Bjorklund did not sit at the (already-overcrowded) petitioners' counsel table, or personally question any witnesses, but she did sit in the courtroom behind counsel table taking notes, as I could plainly observe, and did participate in consulting with and assisting the trial team before and after the actual hours of trial, and during breaks. During the following days of the trial, Ms. Bjorklund listened to certain days of the trial via the specially-provided phone conference, and continued to participate with the trial team by phone consultation, just as she had when she was physically in the courtroom during the first week of trial.

In this regard, I note that respondent has urged that it is not reasonable to compensate Ms. Bjorklund for all of the time that she spent on the trial, in light of the fact that her participation was in *addition* to that of the other attorneys described above. I do find this to be a difficult "judgment call," as to which reasonable minds could differ. But because of the unique importance and complexity of the *Cedillo* trial, described above, I find it reasonable to give the participating petitioners' counsel the "benefit of the doubt" concerning this issue.[8] I find it reasonable to compensate Ms. Bjorklund for most of the hours claimed during the period of the *Cedillo* trial.[9]

4. Travel time to hearing

Ms. Bjorklund's claimed hours include five hours of travel time, to-and-from the trial in Washington, D.C. Those five hours are billed at $275 per hour. However, turning to the actual billing records, the notations state: "Travel to Washington DC for hearings...2.50 [hours]..." and "Travel from Washington DC to Minneapolis...2.50 [hours]." (Bjorklund Affidavit, pp. 5-6.) These entries make no mention of any type of work pertinent to the *Cedillo* case that was performed en route. Therefore, I will compensate these hours at the "travel rate" of one-half of Ms. Bjorklund's hourly rate, as is the common practice in Program proceedings. *King v. Secretary of HHS*, No. 03-584V, 2009 WL 254564, at *4 (Fed. Cl. Spec. Mstr. July 27, 2009); *Kuttner v. Secretary of HHS*, No. 06-195V, 2009 WL 256447, at *10 (Fed. Cl. Spec. Mstr. Jan. 16, 2009); *Carter v. Secretary of HHS*, No. 04-1500V, 2007 WL 2241877, at *6 (Fed. Cl. Spec. Mstr. July 13, 2007); *Isom v. Secretary of HHS*, No. 94-770V, 2001 WL 101459, at *3 (Fed. Cl. Spec. Mstr. Jan. 17, 2001).

[8]It is also noteworthy that the respondent also utilized the services of a number of different attorneys during the trial.

[9]I will not, however, compensate the two hours claimed for June 26, 2010, the final day of the trial, which took only about one hour and involved only brief rebuttal testimony of the petitioner herself and very brief closing arguments. I cannot see how Ms. Bjorklund could have been of any reasonable assistance to the trial team on that day.

Accordingly, I will compensate those five hours of travel time at a reduced rate of $137.50 per hour.

5. Question of possibly duplicative billing

Respondent's objection to the fees requested by the Lommen Abdo firm on behalf of Ms. Bjorklund included the suggestion that, "[a]s the time spent * * * assisting the CHC firm is appropriately billed in the *Cedillo* case, respondent will oppose any duplicative requests for fees in its response to the PSC's interim fees and costs request." (Respondent's Response, p. 51, fn. 95.) There are two aspects of this footnote that warrant comment. First, respondent acknowledged that payment for the hours Ms. Bjorklund spent preparing for and participating in the *Cedillo* trial should be reimbursed through the *Cedillo* fees and costs request, not as part of the PSC (Petitioners' Steering Committee) request that was filed into the *King* case, a second autism test case. See *King v. Secretary of HHS*, No. 03-584V, 2009 WL 3320508 (Fed. Cl. Spec. Mstr. Sept. 28, 2009). Both parties agree on this point. Second, in that footnote, respondent promised to oppose any duplicative request filed into *King*. Presumably, respondent has done so, and that opposition was properly resolved during the discussions leading up to the decision in *King*, which awarded interim fees and costs for general PSC activities, including some fees for the Lommen Abdo firm, after agreement by the parties.

Further, the Petitioners' Reply in this *Cedillo* case includes a statement on behalf of the Lommen Abdo firm that, "[t]o the extent that there is any appearance of a duplicate submission, this was entirely inadvertent. Ms. Bjorklund's fees and costs for work on the *Cedillo* matter that apparently also appear in the PSC application [in *King*] should be included solely in the *Cedillo* application." (Petitioners' Reply, Tab C, p. 3). The Bjorklund Affidavit also conceded that certain expenses related to the *Cedillo* matter were inadvertently filed into the *King* fee petition. Ms. Bjorklund observed that "Respondent has objected to *Cedillo* work/costs submitted with the *King* petition and thus, the undersigned respectfully requests that the Special Master consider all of LA's time/costs spent/incurred in furtherance of the *Cedillo* matter in this petition." (Bjorklund Affidavit, p. 2.) Thus, petitioners have clearly acknowledged the inadvertent inclusion of some *Cedillo*-related items in the *King* fees application, but they insist that all such items should be reimbursed exclusively through the *Cedillo* fees decision.

The decision in which I awarded interim fees and costs in *King* was explicitly designed to include resolution of (1) fees and costs related to the participation by the several law firms in question, including Lommen Abdo, in **general** *PSC activities* over several years, plus (2) fees and costs specifically related to the *King* trial. *King v. Sec'y of HHS*, No. 03-584V, 2009 WL 3320508, at *1 (Fed.Cl.Spec.Mstr. Sept 28, 2009.) Such decision was not, of course, intended to include fees for the *Cedillo* trial. Since I issued that fees decision in *King*, respondent has not filed any document into this *Cedillo* case asserting that the Lommen Abdo fees and costs request in *Cedillo* contains hours or costs that have already been reimbursed in *King*. Respondent has had ample opportunity to assert that there has been duplicative billing, yet respondent has not done so. My own review of the record in both cases also indicates that the hours involved in Ms. Bjorklund's participation in the

Cedillo case were not compensated in *King*, and that this *Cedillo* case is the proper place to compensate such hours.

VII

COSTS

A. Costs stated in Petitioners' Application

Petitioners' Application requested $140.92 in costs, involving long distance telephone calls, a courier service, and legal research services. (Petitioner's Application, Tab L.) Respondent acknowledged that these costs are reasonable. (Respondent's Response, p. 52.) These costs will be granted.

B. Additional costs claimed in Bjorklund Affidavit

Attached to the Bjorklund Affidavit filed on June 2, 2009, Ms. Bjorklund also sought certain travel expenses for her trip to Washington. However, no receipts or other records of those expenses were filed into the record of this *Cedillo* case. (Such receipts were erroneously filed into the record of the *King* case.)

Accordingly, I will not grant compensation for these claimed costs at this time. Instead, when the final fees application is filed in this *Cedillo* case, the petitioners may request these costs, *filing all documentation* into the record of this case. Respondent should then file any objection to such claimed cost into the record of this case.

I will, however, make one comment at this time about those claimed travel costs. That is, I note that in an effort to assist appropriate documentation of litigation costs by petitioners' counsel participating in the OAP, the PSC Executive Committee published a "guidelines" document on September 25, 2003 ("PSC Guidelines"), that was circulated among PSC members. A copy of that document was filed into the OAP Autism Master File on June 5, 2009. Ms. Bjorklund has been a member of the PSC since 2002 (Bjorklund Affidavit, p. 2). While making no determination at this time, I note that the hotel and meal expenses billed by Ms. Bjorklund during her "in person" participation in the *Cedillo* hearing, from June 10 through June 15, 2007 (Bjorklund Affdavit, p. 7), seem, at first glance, to be substantially in excess of the PSC Guidelines guidance.

VIII

CONCLUSION

The following attorney's fees and costs are reasonable and appropriate compensation for the services provided by the Lommen Abdo law firm.

Fees for 139.4 hours[10] of attorney's work at $275 per hour	$38,335.00
Fees for five hours at travel time rate of $137.50 per hour	$ 687.50
Costs	$ 140.92
	$39,163.42

Pursuant to 42 U.S.C. § 30011-15, I hereby award a lump sum of $39,163.42, to be awarded in the form of a check payable jointly to petitioners and their counsel of record. This amount is to be promptly forwarded to the Lommen Abdo law firm.

In the absence of a timely-filed motion for review of this Decision, the Clerk of this court shall enter judgment accordingly.

/s/ George L. Hastings, Jr.

George L. Hastings, Jr.
Special Master

[10]The Bjorklund Affdavit deleted 0.5 hours dated May 29, 2007, that had been billed in the Petitioners' Application, Tab K. I shall do likewise in this Decision, accepting the apparently corrected figures presented in the later-filed Bjorklund Affidavit. Thus, I compensate Ms. Bjorklund for the 146.4 hours claimed in the Bjorklund Affidavit, less the two hours deducted at fn. 9 above, and the five hours compensated at the "travel time" rate described above.